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2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
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5 In the Matter
6 of Case No.
7 RCN Corporation 04-13638
8 Debtor.

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9 July 1, 2004

10 United States Custom House
11 One Bowling Green
12 New York, New York 10004

13 RE: Doc#45; Motion for order authorizing the
14 continuation of an existing employee retention
15 and severance benefits plan

16 B E F O R E:

HON. ROBERT D. DRAIN,
Bankruptcy Judge.

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RCN Corporation

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RCN Corporation

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2 P R O C E E D I N G S

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4 THE COURT: RCN.

5 MR. GOFFMAN: Jay Goffman of Skadden
6 Arps on behalf of RCN and the affiliated
7 debtors.

8 Thank you for making the time for us
9 on your Honor's calendar today. We originally
10 had three motions on the calendar today, two of
11 which have been adjourned. The two adjourned
12 ones were the request to retain Alix Partners.
13 That's been adjourned at the consent of the
14 Committee until July 30 at 10 a.m. The second
15 is the final hearing for an order implementing
16 certain trading procedures with respect to our
17 equity at the request of Vulcan and Wells
18 Fargo. That also has been adjourned, a final
19 hearing on that, until July 30th with the
20 understanding that the interim order will stay
21 in place through that hearing and their
22 objection ends July 19th.

23 THE COURT: Does -- I haven't
24 reviewed that order in a while -- it
25 discontinue to the date of the adjourned

1 RCN Corporation

2 hearing, or do you need to submit anything?

3 MR. GOFFMAN: I believe it is
4 self-executing and it is continuing to final
5 hearing, but we will triple check it, your
6 Honor.

7 THE COURT: Okay.

8 MR. GOFFMAN: That brings us to the
9 one motion on the calendar for today which is
10 our motion to continue our existing key
11 employee retention plan that was entered into
12 prepetition as part of our restructuring
13 process.

14 The motion was properly filed,
15 affidavits of service have been filed and we
16 received one objection, that being the
17 objection by the Wells Fargo and Vulcan
18 Ventures from Andrews and Kurth.

19 The objection, really, the thrust of
20 it is one point and one point only. It says
21 that the debtor is not entitled to the business
22 judgment standard here because, in the view of
23 the objectors, the board did not act on an
24 informed basis.

25 We filed a reply yesterday to refute

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2 that and I think under the circumstances I need
3 to walk through the history here so that the
4 Court can understand the process by which the
5 key employee retention plan was formulated, the
6 discussion with the board, the negotiation with
7 both the banks and their advisors, the
8 committee and their advisors, all the work and
9 the negotiations and the process that went into
10 it to reach a consensual key employment
11 retention plan and the informed basis upon
12 which the board acted in reaching the business
13 judgment.

14 THE COURT: Were you directly
15 involved in that process?

16 MR. GOFFMAN: Yes, I was involved in
17 every aspect of that. I was at every board
18 meeting where it was discussed. When the board
19 asked questions, I was one of the people
20 advising them. I was one of the people
21 involved in helping to formulate the key
22 employee retention plan. I helped to look at
23 the precedents from other cases and I was
24 involved in many of the negotiations. So I'm
25 personally aware of all of the facts.

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2 THE COURT: Okay.

3 MR. GOFFMAN: We also have in the
4 courtroom Mr. John Dubel, who is the president
5 chief operating officer of the company, who
6 participated in the final negotiations on the
7 plan and the key employee retention plan and,
8 if necessary, he would be available to testify,
9 also.

10 THE COURT: Okay.

11 MR. GOFFMAN: The first discussions
12 about the key employee retention plan really
13 began right around the time we began our entire
14 restructuring negotiations back in October,
15 2003.

16 At that time, the board recognized
17 that it was important in order to maximize the
18 value of the estate for all stake holders; that
19 we make sure that we could keep our key
20 employees retained and focus on the process of
21 running the business and not worry about having
22 to find alternative jobs. So they asked their
23 advisors about what was done in three
24 restructuring negotiations processes, and they
25 were told that key employee retention plans

1 RCN Corporation

2 were very normal.

3 What comes across in the objection,
4 your Honor, is that there is nothing in the
5 objection that would even suggest that a KERP
6 isn't normal. That a KERP would not be
7 standard in a restructuring negotiations
8 because they are, and the board was so advised
9 and the board asked its senior management and
10 its advisors to work on putting one together.
11 And over the course of October and November,
12 the senior management and its outside advisors
13 did so.

14 They looked at other precedents.
15 They looked at other examples of comparable
16 companies going through restructurings in
17 similar industries, and they devised a key
18 employee retention plan.

19 They had discussion with advisors of
20 the bank and bondholders about that to try to
21 incorporate their thoughts and suggestions,
22 understanding that although it was vital to
23 make sure that the employees stayed retained,
24 it was also important that the key creditors
25 constituencies be active in the negotiation of

1 RCN Corporation

2 that.

3 In December of 2003 that KERP, that
4 initial presentation of the KERP, was made to
5 the compensation committee of the board. The
6 compensation committee was comprised solely of
7 outside disinterested directors.

8 At that time, the compensation
9 committee after a full presentation approved
10 the KERP in concept and suggested further
11 discussions with representatives of the banks
12 and the bondholders who we had been negotiating
13 with and then presentation to the board itself.

14 Those discussions continued with the
15 representatives of the banks and the
16 bondholders through the remainder of December
17 and into January, and then on or about January
18 12 at another board meeting, a presentation was
19 made to the entire board about the key employee
20 retention plan, the purpose for it, the need
21 for it, how it was negotiated, what the
22 bondholders and banks had asked for, the
23 benefits of it and how it compared to other
24 situations. And, on that basis, the board
25 ratified the key employee retention plan in

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2 concept but with the understanding that there
3 would still be ongoing negotiations with the
4 banks and bondholders over the finalization of
5 that, and those negotiations did continue over
6 the next many weeks, the final set of
7 negotiations regarding this.

8 And your Honor is well aware that a
9 key employee retention plan is negotiated with
10 banks and bondholders as part of an overall
11 restructuring. No element of a restructuring
12 is done until all the elements are, and this
13 was negotiated heavily as part of the entire
14 restructuring, and Mr. Dubel carried on all of
15 the final negotiations.

16 Now, this is relevant for a couple
17 of reasons. First, Mr. Dubel is not a
18 participant in the key employee retention
19 plan. He has no interest in it. He doesn't
20 get anything out of it, so there is no personal
21 interest in the key employee retention plan for
22 Mr. Dubel.

23 Also, Mr. Dubel has a tremendous
24 amount of experience in this area. He's been
25 doing and leading restructurings for over 20

1 RCN Corporation

2 years. Most recently, before he joined RCN, he
3 was the CEO of Cable and Wireless USA in their
4 restructuring in Chapter 11. Before that he
5 was the CFO at WorldCom in their Chapter 11
6 case and his credentials are impeccable. He
7 participated in all the negotiations and the
8 negotiations were very difficult.

9 In the final negotiations with the
10 bondholders on this, there were numerous
11 exchanges. Certain of the bondholders were
12 able to extract certain additional concessions
13 from the debtors as part of these
14 negotiations. They got the company to agree to
15 have any participants waive any rights under
16 the existing chairman's plans. They got the
17 company to agree to reduce certain severance
18 benefits. They got the company to agree that
19 the amount of severance benefits of the chief
20 executive officer would be significantly
21 reduced. The severance tail period was
22 significantly reduced, and the mitigation
23 period was reduced also. So there were several
24 significant changes made even until the final
25 changes. Those final changes were then

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2 presented to the board again on May 26th as
3 part of the overall restructuring plan.

4 A final presentation was made at
5 that time and, as part of that, after a full
6 analysis, a full discussion and a presentation
7 of all the relevant facts, the board made an
8 informed business decision that approving the
9 modified key employee retention plan was in the
10 best interest of the estate.

11 We believe that those facts show
12 that the board acted on an informed basis.
13 They made a rationale business judgment. It is
14 a modest key employee retention plan. It
15 includes a total of only 76 people that are
16 part of it.

17 The total amount that could be at
18 issue here is less than \$10 million, and that
19 includes the total amount of potential
20 severance benefits if all severance was
21 included, and we are talking about less than 10
22 million for a company where the debt itself,
23 the debt itself exceeds \$1.7 billion before you
24 even get anywhere near the equity value.

25 It was on that basis that debtors

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2 decided to proceed and we think that all the
3 standards for meeting the business judgment
4 standard have been satisfied.

5 Given that, even the objectors have
6 admitted that the business judgment standard is
7 the relevant standard. We have now shown that
8 all the factors necessary to support the
9 business judgment rule are in place. We think
10 there is no basis for their objection.

11 The two other points I would like to
12 make, just so the record is clear, they raise
13 some questions about whether or not the key
14 employee retention plan is just a plan designed
15 to keep people in place and does not
16 incentivize people to work towards improving
17 the company. Well, they are wrong on all
18 fronts.

19 First, the main purpose of any key
20 employee retention plan is to keep your key
21 employee retained. That is your goal when you
22 are going through a restructuring process. It
23 breaks into two pieces. You have a retention
24 plan where you pay people bonuses for staying
25 on through a certain period of time, in our

1 RCN Corporation

2 case, through confirmation.

3 Secondly, you have a severance
4 period protection, so people know if they are
5 terminated they have some protection there. In
6 addition, we do have a section of our retention
7 payments that are geared towards how well the
8 company does. So a good portion of our
9 retention payments are only paid if the company
10 achieves certain goals, so they are wrong in
11 how the targets are set.

12 Our key employee retention plan is
13 modest. It is properly geared towards keeping
14 the key employees retained and focused. It has
15 been heavily negotiated with the banks and
16 bonds. You will hear it is supported by both
17 banks, bonds, the official creditors committee
18 and it is absolutely essential to making sure
19 that our employees know that they are protected
20 as we go through this restructuring process. I
21 will ask your Honor to approve the order.

22 THE COURT: Let me ask you a few
23 questions about it.

24 First of all, on the performance
25 component, how are the operational targets

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2 established for that component? Is there an
3 independent committee that does that?

4 MR. GOFFMAN: If I may, your Honor.
5 The way these targets were set, your Honor,
6 it's all based off the company's business
7 plan. The business plan, based upon the
8 company's business plan, which is at the core
9 of the entire restructuring, it is sort of out
10 of the core how we get financing in place and
11 get this company reorganized; but based upon
12 that, we set certain targets off of that and
13 are hitting certain milestones against that
14 business plan is what's required in order for
15 the couple of employees to get the
16 compensation. That's how it was presented to
17 the compensation committee.

18 THE COURT: They have already been
19 set, in other words, this was part of the
20 negotiation with the banks and bondholders?

21 MR. GOFFMAN: It was presented to
22 the compensation committee and the banks and
23 bondholders are fully aware of it.

24 THE COURT: Okay. Is there any,
25 other than the plan that is released, claims

1 RCN Corporation

2 that are released? Is there any other bonus or
3 incentive plan out there for these employees?

4 MR. GOFFMAN: The company does have
5 its normal short term incentive plan for
6 employees that exists. It is out there all the
7 time. It is not a key employee retention
8 plan. It is just the normal incentive plan for
9 the employees.

10 THE COURT: That would cover the
11 76?

12 MR. GOFFMAN: Yes, it does cover.

13 THE COURT: And that is something
14 also that the bondholder and banks have
15 reviewed?

16 MR. GOFFMAN: Yes, the bondholder
17 and banks are fully aware. The bondholder and
18 banks are aware of that fact and every fact.

19 THE COURT: The short term plan
20 really is tied to the amount of the performance
21 of the company. It is not tied to the
22 bankruptcy per se?

23 MR. GOFFMAN: That's correct, your
24 Honor. .

25 THE COURT: And these employees

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2 receive other than sort of normal inflation
3 based raises during the restructuring period?

4 MR. GOFFMAN: No, I don't believe
5 they did, your Honor. We are advised there was
6 2 percent raises, which I think is consistent
7 with inflation.

8 THE COURT: As I read the plan, and
9 by that I mean both the retention and the
10 severance elements of it, for the tier one
11 through three employees, it appears to me that
12 there is a severance element of retention, i.e.
13 you get your retention payment even if you're
14 terminated before confirmation; is that
15 correct?

16 MR. GOFFMAN: Yes, your Honor.

17 THE COURT: And then, as I read it,
18 the actual severance doesn't kick in unless you
19 are working after the effective date for those
20 three groups. So, in effect, you are not
21 double dipping on the severance element; is
22 that correct?

23 MR. GOFFMAN: May I confer, your
24 Honor. What we did with severance, your Honor,
25 it is the company's normal severance policy.

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2 What we did, the enhanced severance policy is
3 basically when you are terminated for these
4 matters, there is an enhanced severance piece
5 that's subject to mitigation.

6 So if you were to go out and get
7 another job, you are not going to get that paid
8 essentially as a bonus if you have another
9 job. The idea was to protect people -- you
10 needed to have a retention payment to
11 incentivize people to stay but you also
12 couldn't take away their normal retention,
13 their normal severance protection so if they
14 were terminated without cause they would have
15 that and this minor enhancement was subject to
16 mitigation. .

17 THE COURT: Well, the way I read
18 this is severance is triggered if participants
19 employment with the company is terminated after
20 the effective date. So as I read that, which
21 appears on page 4 --

22 MR. GOFFMAN: Of the motion or the
23 requirements?

24 THE COURT: Of the actual plan.

25 MR. GOFFMAN: Maybe I can clarify,

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2 your Honor. The effective date I think that
3 you are reading is the effective date of the
4 KERP plan, not the effective date of the plan
5 of reorganization, and the effective date of
6 the KERP plan was February 10th, the date that
7 the board approved it. I think that's the
8 confusion, your Honor. I apologize.

9 THE COURT: There is, in effect,
10 double dipping?

11 MR. GOFFMAN: I don't know if I
12 would call it double dipping. What there is,
13 there is a retention bonus to keep people in
14 place and then if people are terminated without
15 cause, there is a severance component subject
16 to mitigation.

17 THE COURT: Okay. Is there a reason
18 why the debtors would terminate someone without
19 cause before the confirmation of the plan
20 triggering the right to retention bonus? Is
21 there something anticipated with that
22 happening?

23 MR. GOFFMAN: It is hard for me to
24 imagine why we would terminate someone without
25 cause prior to the effective date, prior to

1 RCN Corporation
2 confirmation of the plan if we did a cost
3 benefit analysis that showed it was going to
4 cost us more money by doing so. .

5 MR. GOFFMAN: The issue is, your
6 Honor, over the course of time, we have
7 continued to rationalize the company's capital
8 structure. We have gone from, we have reduced
9 the number of employees very significantly over
10 time. We are continuing to look at a whole
11 variety of factors to continue to correct our
12 capital structure and there is always a
13 potential to look at different ways to fix our
14 capital structure that we may come to a
15 conclusion that it makes sense to terminate
16 someone at some point in time.

17 We would always look at the cost
18 benefit analysis to see whether or not it
19 incurred more expense by doing so than we'd be
20 saving, but we would always make that cost
21 benefit analysis.

22 THE COURT: Okay. At this time, you
23 are not aware, and I'm looking at Mr. Dubel as
24 well, you are not aware of anyone you plan to
25 terminate in the near future that would be

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2 covered by this program?

3 MR. GOFFMAN: There is only one
4 person. He's a former counsel, but he didn't
5 get, by agreement by the committee, he's not
6 getting any severance. We have already
7 accounted for that.

8 THE COURT: Okay. Am I right that
9 the CEO can get his severance even if he
10 resigns?

11 MR. GOFFMAN: Can I let Mr. Dubel.

12 MR. DUBEL: John Dubel. Your Honor,
13 yes, that's correct. The CEO if he chooses to
14 resign would be entitled to the benefits there
15 under the plan. It was all part of an overall
16 agreement with the creditors ad hoc committee
17 and Mr. Macord did give up tremendous benefits
18 that he had, he was entitled to, including an
19 enhanced severance. He reduced his portion of
20 the severance.

21 He had a potential entitlement to a
22 significant chairman's plan bonus that had been
23 in place for three or four years and, again, he
24 agreed to reduce that and as part of an overall
25 settlement.

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2 Until Mr. Macord has an opportunity
3 to sit down with the creditors and make a
4 determination what his role in the future is
5 with the creditors, he's agreed that he would
6 have the ability to leave the company. But he
7 has expressed to me the interest in staying and
8 seeing this through the full reorganization
9 and, also, working with the creditors to figure
10 out what his role would be in the future.

11 THE COURT: Okay. There is a
12 provision at the start of this in this program
13 eligibility that says that schedule A proviso.
14 Schedule A may be amended. Schedule A is the
15 schedule that sets forth the name of the tiers
16 one through three as well as the CEO. It says
17 schedule A may be amended any time during the
18 duration of the scheduled order to replace any
19 participant who voluntarily terminates
20 employment with the company or whose employment
21 is terminated by the company for cause.

22 Given the other bells and whistles
23 that the company has in here, is that -- what
24 is the purpose of that provision? Is it to
25 deal with a situation, for example, where

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2 Mr. Macord tries to jerk people around he can
3 take them off the schedule? I'm not impugning
4 Mr. Macord. I am just trying to figure out why
5 it is there.

6 MR. DUBEL: Your Honor, why it is
7 there we effectively agreed to a dollar amount
8 of bonus that would be available under the KERP
9 program -- an amount of severance that that be
10 available and, to the extent we lost an
11 employee of their own volition, if they were to
12 walk out the door and we needed to replace that
13 person, whether it was through promotion or an
14 outside hire and that was one thing we needed
15 to add due to the uncertainty of the Chapter 11
16 situation, we would have the ability to replace
17 someone within that program but it would still
18 be subject to the caps of the \$3.5 million on
19 the bonus and the severance portion.

20 THE COURT: It is a more a question
21 to give the company the flexibility to add
22 people in?

23 MR. DUBEL: Yes, only if we have
24 people.

25 THE COURT: Only after you drop the

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bomb.

Is Mr. Macord actually involved in running the company?

MR. DUBEL: Every single day, your Honor.

THE COURT: In deciding on the amount of mitigation, did the advisors look at other types of severance plans for comparison?

MR. DUBEL: Your Honor, when we initially set the plan up, the severance portion of it was reviewed and other documents had been reviewed, other plans had been reviewed.

I looked at it based on my experience of having negotiated severance and KERP plans over the last 20 years or so of doing restructuring and the committee felt they had a concern that severance portion in excess of the ordinary amount that the debtor had in their program was excessive.

Our view was it wasn't meant to be a windfall for employees but it was simply meant to be a downside for protection because we didn't want people to be focused on the

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2 downside situation as to whether they had a job
3 or not within the situation dealing with
4 Chapter 11. We agreed to take the excess
5 severance over and above the plan, over and
6 above mitigation to give people the downside
7 protection over the windfall and, in my
8 experience, doing it that way would be
9 consistent, maybe it would be a little bit less
10 than I've seen for other plans.

11 THE COURT: So the company's prior
12 severance program before this enhancement
13 didn't have a mitigation component?

14 MR. DUBEL: No.

15 MR. GOFFMAN: No, it didn't, your
16 Honor. Also, your Honor, just so you know,
17 what we did in formulating the key employee
18 retention plan in the beginning is because we
19 as a firm have a lot of experience in all types
20 of restructuring cases over the many years, we
21 had the luxury of actually having a chart that
22 showed a whole slew of similar restructuring
23 cases and their key employee retention plan.

24 So we were able to do a very careful
25 comparison of what we were putting together

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2 with other similar key employee retention plans
3 in other cases for the very reason now when we
4 sat down with the banks and the bondholders, we
5 wanted to make sure that what we were
6 presenting to them was something that they
7 would say was within the range of what they
8 would see as being normal for this type of case
9 in these types of circumstances. So, yes, we
10 actually did look at all those types of
11 factors.

12 THE COURT: All right. Thanks.

13 Did anyone else want to speak in
14 favor of the motion before I hear from Wells
15 Fargo?

16 MR. DUNNE: Yes, your Honor. Good
17 morning, Dennis Dunne from Milbank, Tweed on
18 behalf of the employee on behalf of the
19 official creditors committee.

20 The official creditors committee
21 supports the motion though I would like to
22 emphasize that what's before your Honor today
23 is Mr. Goffman has indicated the product of
24 several rounds of negotiations between not only
25 the official creditors committee but the ad hoc

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2 committee and note holders who conducted these
3 negotiations prepetition; and, as a result of
4 them, I'm not going to go into all the changes,
5 but principally and materially we reduced the
6 number of participants, reduced the overall
7 costs and set what we thought were more market
8 triggers. And, as a result of that, the
9 advisors to the committee, Janette Capital,
10 have informed the committee that we are within
11 acceptable parameters and our metric might be
12 slightly different than the debtors.

13 We tend to look at things on an
14 aggregate basis, and if you look at the maximum
15 amount payable under the retention portion,
16 that is roughly three-and-a-half million
17 dollars. On the severance side it is six
18 million but that is only if every employee in
19 the company were terminated.

20 We tended to use a 50 percent number
21 as being extremely aggressive for a company
22 that is an going concern company and you look
23 at the total there, you have three and a half
24 million plus maybe three million in severance,
25 and you got up to about a six million dollar

1 RCN Corporation

2 aggregate pot for this plan, and if you
3 compared that to the debt and the revenues of
4 this company, on the debt basis you are at a
5 fraction of one percent in terms of what this
6 plan is as a percentage of the debt; and on
7 revenues this company has approximately 500
8 million dollars of revenue a year and you are
9 still at roughly one percent of revenue which,
10 according to the advisors, is well within
11 acceptable parameters comparing it to other
12 KERP plans that have been proposed.

13 And with that, your Honor, the
14 creditors committee supports the plan.

15 THE COURT: It sounded from
16 Mr. Goffman Mr. Dubel's response to my question
17 on the CEO treatment that that reflected also a
18 fairly heavy element of settling potential
19 claims that he may have.

20 Is that your view as well?

21 MR. DUNNE: Yes. I agree with your
22 Honor's reaction that typically you would not
23 see the ability for the CEO to resign and then
24 get this package of compensation, but here it
25 was two-fold, one of which is what your Honor

1 RCN Corporation

2 alluded to, the settlement of pre-existing
3 rights he had under a chairman's plan and
4 otherwise.

5 And the second is I think there is
6 no agreement as to his future role with the
7 company that's ongoing and this was all part of
8 the settlement, so, yes, the committee supports
9 them.

10 THE COURT: It was the committee's
11 view in evaluating his potential rights this
12 claimant would potentially be on at least a par
13 with the unsecured claims?

14 MR. DUNNE: Yes, sir.

15 MR. GRAFF: Good morning. Elisha
16 Graff; Simpson Thacher on behalf of JP Morgan
17 Chase, administrative agent for the debtors
18 presecured lenders. I will be very brief in my
19 remarks, your Honor.

20 As Mr. Goffman represented on the
21 record, the terms of the KERP were ostensibly
22 negotiated with all the debtors key creditors
23 constituencies and the prepetition secured
24 lenders. The terms of the KERP as represented
25 to the court today are acceptable to the

1 RCN Corporation
2 prepetition secured lenders and the lenders
3 are, therefore, in the position of supporting
4 the debtors motion.

5 MS. UNIMAN: Good morning, your
6 Honor. Lynne Uniman of Vulcan Ventures and
7 Wells Fargo. In response to the objection that
8 we filed yesterday we got a reply.

9 Our initial objection focused on the
10 process. It was virtually nothing set forth in
11 the papers to explain what process was
12 undertaken. We are now told about the process
13 and we believe that the process is lacking.

14 Your Honor asked some very
15 interesting questions, many of the questions
16 that I have for the witness today. But there
17 is some interesting components to this plan, in
18 addition to those that your Honor had pointed
19 out.

20 Unlike many of the cases that are
21 currently in this court, there was no
22 independent compensation expert or HR person
23 consulted whatsoever with respect to this
24 plan. We know nothing about any studies that
25 were looked at about employees leaving.

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2 Indeed, how many of the 76 employees
3 are new hires, meaning hires that were made
4 while the financial troubles of the company
5 were already known? Their moral? Their risk
6 flight? Those are just nonissues. What were
7 the costs in replacing employees? We don't
8 know that. We don't know if any studies were
9 looked at. We don't know, indeed, what
10 compensates -- the total mix of what
11 compensation packages have been eliminated by
12 virtue of this plan.

13 We heard about the chairman's plan.
14 Are there employment agreements? What's the
15 nature of the bonuses? What were the bonuses
16 last year? Your Honor asked about performance
17 targets. Who sets them?

18 The CEO retention of 120 percent of
19 his salary seems to be unprecedented in cases
20 that have recently been before this court.
21 Indeed, the cost itself of the program? The
22 PSI net? A six million dollar program covered
23 595 employees, not a mere 76. Is there going
24 to be a reduction in force? Your Honor, these
25 are all questions that we still need answers

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to.

And with that I would like to call Mr. Dubel to the stand.

THE COURT: Okay.

J O H N D U B E L,

having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. UNIMAN:

Q Good morning, Mr., is it Dubel. Did I pronounce it correctly?

A Yes, did you. Dubel.

Q Let me formally introduce myself. I'm Lynn Uniman from Andrews and Kurth. I have a few questions for you today.

Now, the amounts that are allocated to be paid under the KERP, are those absolute caps or can those amounts be varied?

A We have a universe of 76 people who are participants in the KERP, and those amounts are calculated and predetermined at this point in time.

To the extent that someone leaves of their own volition or per cause, then the

1 RCN Corporation

2 amount would drop down and we have the ability
3 under the KERP plan to add, to replace that
4 person but up to the level that has previously
5 been approved.

6 Q Are there any circumstances where
7 the amounts, the 3.5 retention or the 6.1
8 severance could be increased?

9 A In my view, not without further
10 approval of the court.

11 Q Now, the termination benefits, those
12 are based on the then current salary of the
13 various salaries; is that correct?

14 A The severance benefits are based on
15 the salary of the employee at the time of the
16 severance at the time of the termination.

17 Q Are there any caps in place on what
18 raises will be in the future?

19 A We have no caps. We have business
20 judgment rules that we go through. We are
21 looking at any number of things. As we shrink
22 our operations, cut costs, we may give a raise
23 to someone if they take on additional
24 responsibility.

25 We have generally maintained those

RCN Corporation

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2 types of raises when we can give them on those
3 types of responsibilities and less than 10
4 percent, but only in those circumstances where
5 they have taken on additional responsibilities
6 or had promotions.

7 Q Right now there are no caps in
8 place?

9 A There are no specific caps, no.

10 Q Now, you were not involved in the
11 initial idea of developing a KERP for RCN, were
12 you?

13 A I was not involved with RCN at the
14 time that it was initially proposed, that is
15 correct.

16 Q And when did you first become
17 involved?

18 A I was retained on February 10 of
19 2004.

20 Q And that was after the board had
21 already met with respect to the KERP?

22 A I don't know the exact time frame.
23 I was retained in the same board meeting. I
24 wasn't in the board meeting for the full period
25 so I don't know whether it happened just prior

1 RCN Corporation

2 to me or immediately after I was retained.

3 Q And in connection with adopting this
4 KERP, was it modeled on any other plans?

5 A As Mr. Goffman stated before, it was
6 based -- the company's general counsel, the
7 company's VP of employee services, the
8 executive vice president who was working with
9 the company at the time on the restructuring
10 all sat down and reviewed plans that had been
11 developed in the past that they had been
12 provided by both the financial advisor, Merrill
13 Lynch, at the time, and also folks at Skadden
14 Arps, so it was modeled after all of those
15 plans. I don't specifically know which one it
16 was modeled after though.

17 Q You don't know which plans?

18 A I don't know personally, no.

19 Q Do you know of any plans that
20 provide a CEO with a retention benefit equal to
21 120 percent of his base salary?

22 A I don't know of any of them off the
23 top of my head I can give you examples of. I
24 do know I have seen many plans in the past that
25 have bonus potential of up to 200 percent for

1 RCN Corporation

2 CEOs or severance programs that would have been
3 two or three years that would effectively be
4 the same situation.

5 Q But you can't recall any today?

6 A I can't recall any off the top of my
7 head, no.

8 Q Now, would any of the 76 employees
9 who will participate in this plan participate
10 in any other compensation or severance plan?

11 A All 76 of the employees are
12 participants in the company's severance
13 program, but, in essence, this KERP program
14 supersedes the severance portion of it because
15 it gives them the standard that they would
16 normally have received, plus the enhanced
17 portion again that is subject to mitigation.

18 In terms of the bonus side of it,
19 the vast majority of the employees in the
20 company are entitled to participate in normal
21 operating short term incentive and other bonus
22 programs that the company has and so, to the
23 extent that all 76 of those people are employed
24 by the company, they are participants in the
25 short term incentive programs.

1 RCN Corporation

2 The other program that the company
3 had in the past was a stock incentive program
4 which the vast majority of these employees, the
5 76, would have been entitled to participate in
6 but because of the company's stock price, the
7 options they might have received in the past
8 are no longer in the money they are not going
9 to receive anything under that plan.

10 Q And what is the magnitude of the
11 bonuses that these 76 employees will receive
12 under the bonus plan?

13 A Under the short term incentive plan,
14 it depends on the level but, traditionally, it
15 is for the senior executives 40 percent of
16 their base salaries and it drops down to 10 to
17 15 percent at the lower levels; and, again, it
18 is all based upon the performance of the
19 company and it is based upon historical
20 programs, so it is consistent with what the
21 companies have had in the past for its short
22 term incentive programs.

23 Q How many of these 76 individuals
24 would fall into the category of senior
25 executives as you've just described them?

1 RCN Corporation

2 A I don't know the number. I would
3 have to look at the list, the tier one and tier
4 two employees, typically the vice-presidents.

5 Q And are any of these 76 employees,
6 do any of them have employment agreements?

7 A Of the 76 that are participants in
8 the KERP plan, I don't believe any of them do.

9 Q That includes the CEO?

10 A The CEO, to my knowledge, doesn't
11 have an employment agreement. There are some
12 people that have employment letter. That
13 layout what their salary is but they are not
14 what you would look at as a traditional
15 employment contract.

16 Q Now, how many of the 76 individuals
17 were participating in the chairman's
18 performance or retention plan?

19 A Of the current 76 people, I think
20 there was approximately 53 that had been
21 participants. It may have actually gone down.
22 I may have that number down. It may be 33. I
23 think it was originally 53 in the chairman's
24 plans. It is now 33. Of the 76, 33 are
25 participants.

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Q Is that plan still in effect with respect to other people that are not within the 76?

A Of the current population of people in the chairman's plan, roughly 33, all of the people who are participants or potential participants in the chairman's plan are encompassed in the 76. So, in essence, there is no one who are not in the 76 KERP list who is a participant in the chairman's plan.

Q And does the chairman's plan still exist or has it been abolished?

A The chairman's plan still does exist and it is being replaced by this KERP plan.

Q Now, was there any comparison of costs done comparing the chairman's plan and the proposed KERP?

A Yes, there was.

Q And what were the results of that comparison?

A The chairman's plan could have potentially been much more expensive to the company. Approximately two to three times as expensive.

1 RCN Corporation

2 Q When you say could have been, what
3 do you mean?

4 A It depended upon whether people were
5 employed with the company at the June 30, 2005
6 date. So if someone was not employed, they
7 would not be a participant in the chairman's
8 plan.

9 Q Now, under the current severance
10 plan, what would a tier one employee be
11 entitled to?

12 A I'm sorry. Under the current or
13 under the KERP plan?

14 Q Under the current severance plan?

15 A Traditionally a tier one participant
16 would be entitled to a six months severance.

17 Q And that is pursuant to the KERP
18 being increased to a year?

19 A The first portion of it, which would
20 not be subject to mitigation, which was
21 inconsistent with the company's current plan,
22 would stay in place. The enhanced portion,
23 which would increase the portion to a year,
24 that second half of it would be subject to
25 mitigation. So if an employee during the first

1 RCN Corporation

2 six months obtained employment at the same or
3 higher salary, they would get nothing of the
4 enhanced severance.

5 If they did not get a job or if they
6 got a job for less salary, they would get
7 either the full amount or the delta between
8 what their current salary would be and what
9 they were entitled to under the severance plan.

10 Q And they would also get health
11 benefits under the KERP plan?

12 A For the tier one, yes.

13 Q And under the current severance
14 plan, would that employee get health benefits?

15 A That is correct.

16 Q And under the current severance
17 plan, what would a tier two employees be
18 entitled to in terms of severance?

19 A Four months, I believe.

20 Q And under this plan, it's six
21 months?

22 A I don't remember. I'd have to
23 look. It is six or eight months.

24 Q And what would a tier three employee
25 be entitled to under the current severance

RCN Corporation

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2 plan?

3 A Usually two to three months.

4 Q And under this plan it is four to
5 six?

6 A It would be basically doubling that,
7 yes.

8 Q Now, is any comparison from a cross
9 standpoint done between the old severance plan
10 and the new one for those who will participate
11 in it?

12 A In terms of the incremental
13 additional dollars?

14 Q Yes.

15 A Yes, there was.

16 Q And what were the results of that
17 study?

18 A The study said to the extent the
19 total potential liability that the company
20 would have would be approximately \$6.1 million
21 if all participants were severed and none of
22 them obtained employment to offset during the
23 second half, the maximum would be 6.1. Under
24 the current program it was approximately \$3
25 million, 3.2, I believe.

1 RCN Corporation

2 So a little less than twice as much,
3 but, again, this second half of it, that
4 incremental \$3 million is subject to mitigation
5 if the employees do obtain employment at or
6 equal or above their current level employment
7 salary.

8 Q Except for the CEO, correct?

9 A Except for the two employees, two
10 participants, the former general counsel, who
11 as part of an overall settlement is only
12 entitled to the standard severance and the CEO,
13 who agreed as part of the overall settlement
14 that he would only have one year of severance.

15 Q Right, and that's not subject to any
16 mitigation whatsoever; am I correct? If he
17 gets a job the next day, he still gets paid?

18 A That would be based upon what would
19 have been standard that he would have received
20 in the ordinary course under the company's
21 programs.

22 Q Which program?

23 A The company's standard severance
24 programs.

25 Q So you didn't change his program at

1 RCN Corporation

2 all?

3 A On the severance piece, we had
4 originally had a higher amount. He was
5 entitled to two years of severance, and as part
6 of the ultimate settlement in negotiations, he
7 agreed to reduce it down to one year and that
8 was part of the trade off for him to be able to
9 enable himself to resign if he chose to and
10 still receive his severance programs.

11 Q How many of the 76 employees --
12 withdrawn.

13 How long have the 76 employees
14 covered by this plan been employed by RCN?

15 A It varies by employee. We have some
16 that have been with us since prior to the
17 inception. Some of our employees have been
18 with us approximately 30 years even though they
19 were with predecessor companies that ultimately
20 became RCN and some of them have been with us a
21 year. Like any employee population, it varies,
22 but we have traditionally what I would look at
23 for a company that is about seven, eight years
24 old, we have an employee population that's been
25 with us quite sometime.

1 RCN Corporation

2 Q Were there any employees of the 76
3 that were hired by RCN from October, 2003 to
4 the present?

5 A I do not believe that there were any
6 people on the list that were hired from the
7 initial list. There were people that were
8 taken off the list even though they might have
9 been entitled to it but, as part of the final
10 negotiation, we did remove some employees. I
11 don't think there was anybody that was added to
12 the initial list that are currently on the 76
13 list.

14 Q Now, did you examine any data to
15 determine the employee turnover rate
16 prefinancial difficulties of RCN versus the
17 current state?

18 A I know that we have gone from
19 approximately 7500 employees down to our
20 current level, which was approximately 2420,
21 and through a significant amount of cost
22 reduction that the company has gone through, we
23 have had, depending on what department, I would
24 view as a normal level of attrition, but we
25 also have an extreme amount of concern and have

1 RCN Corporation

2 had an extreme amount of concern amongst the
3 senior employees as to the ultimate resolution
4 of the restructuring, and I think the fact that
5 we have this KERP in place, or that even prior
6 to it being in place, that the company had been
7 negotiating to put one in place, has had a very
8 positive effect on the employees.

9 In my decision and all the senior
10 employees, they are very comfortable with it.
11 They are willing to work through the
12 restructuring, understanding that, you know,
13 within any restructuring their jobs are at risk
14 but they have the appropriate downside
15 protection for putting their job at risk.

16 Q Did you examine any studies or
17 empirical data that reflected that the
18 employees that are covered by this KERP could
19 not be replaced? In my discussions and --

20 A No, I did not.

21 Q Did you look at any studies or
22 empirical data to determine the cost that it
23 might be to replace any of these 76 employees?

24 A I did not look at any studies, but
25 based upon my experience in running companies

1 RCN Corporation

2 or being involved with senior executive levels
3 of companies for the last 15 years and so and
4 an advisor for 10 years before that, it is my
5 experience that, at a minimum, it traditionally
6 costs 25 percent to 33 percent to replace an
7 employee through just the outright costs of
8 hiring, and then you'd have the disruption to
9 the business and the time frame in which the
10 employee is missing because you traditionally
11 don't find immediately but you could be out
12 three, four, five, or even six months trying to
13 find someone. And I hate to say it this way,
14 and sometimes the quality of the individual
15 that is attracted to a company in a Chapter 11
16 is not as high as you would like because the
17 higher quality people when it is going through
18 a Chapter 11 restructuring are concerned about
19 it and do not take on the challenge.

20 So while we have high quality people
21 in place, if we were to lose them, the impact
22 of the business over and above the outright
23 direct cost through the lost productivity could
24 easily exceed two or three times the costs of
25 the KERP or enhanced severance.

1 RCN Corporation

2 Q Did you do any study that reflects
3 that it would be two to three times the cost of
4 the KERP?

5 A I did no studies. That's based upon
6 my experience doing this type of work for
7 approximately 20 years.

8 Q The 25 to 33 percent higher in costs
9 that you gave me, does that include the costs
10 of an executive recruiter?

11 A That would include the cost of an
12 executive recruiter to some degree, some
13 intentional costs of advertising, time and
14 effort, et cetera.

15 Q And in today's market, isn't it true
16 that executive recruiters are reducing their
17 normal percentages or fees for employees?

18 A It depends upon the job search and
19 the situation.

20 Q Now, a portion of the retention
21 bonuses were already paid, weren't they?

22 A Yes, they were.

23 Q And when were they paid?

24 A They were paid on or about May 10,
25 2004.

1 RCN Corporation

2 Q I'm sorry. I'm sorry to cut you
3 off.

4 And why were those payments made
5 then before this motion could be heard?

6 A The original agreement and the KERP
7 plan that was put in place on February 10th
8 called for a payment of 25 percent to the
9 employees 90 days after the effective date of
10 the KERP, again, being February 10th, so on or
11 about May 10th, the payment was made reflecting
12 that agreement.

13 Q Now, the payments that were already
14 made, are they included in the 3.5 million
15 allocation for the retention payments?

16 A Yes, they are.

17 Q Now, by this motion, are you seeking
18 to have this court bless those payments nunc
19 pro tunc?

20 A I have to apologize. That's a legal
21 question. You have to ask counsel.

22 Q I will rephrase.

23 Are you seeking in this motion to
24 have the payments that were already made
25 approved by this court?

1 RCN Corporation

2 A Again, I apologize. I would have to
3 ask counsel that.

4 Q Now, has a reduction in force taken
5 place at RCN?

6 A We have had numerous reductions in
7 force. As I've stated earlier, we have got
8 from approximately 7500 employees to about 2420
9 employees and we are constantly looking at cost
10 efficiencies in our operations.

11 Q Is there another RIF planned?

12 A We are constantly looking at ways
13 that we can improve the efficiencies of our
14 cost structure.

15 Q Do you know if any of the 76
16 employees will be part of any reduction in
17 force?

18 A As I stated earlier, just the former
19 general counsel and that is the only person
20 that, as I sit here today, that I know is part
21 of a reduction in force.

22 Q Now, no plan of reorganization has
23 been filed in this case yet; is that correct?

24 A That's correct.

25 Q And how do you know that a plan of

1 RCN Corporation

2 reorganization won't provide for all the
3 management?

4 A I'm sorry. I couldn't hear.

5 Q How do you know that any plan of
6 reorganization that's approved won't provide
7 for all new management?

8 A Until we file a plan, I don't know
9 what it would be.

10 Q And you don't know whether any plan
11 that is approved by the Court will provide --

12 MR. GOFFMAN: I tried not to. I let
13 the questions go. These types of questions
14 really are not appropriate. Everyone in the
15 courtroom knows that a proposed plan doesn't
16 provide new management.

17 THE COURT: But I think we are
18 moving along fairly quickly.

19 MR. GOFFMAN: That's a decision for
20 the reorganized board after confirmation.

21 Q Now, in considering other plans, do
22 you know whether the KERP in WorldCom was
23 considered?

24 A I was a participant in developing
25 the KERP with WorldCom, along with many others,

1 RCN Corporation
2 including recently a company called ET Turner
3 Corporation, which was a telecommunication
4 equipment provider, similar industry, cable And
5 Wireless, America transport and web hosting
6 provider, again similar type of industry, and I
7 was a participant in developing all of those.

8 Q Right, but do you know whether the
9 RCN board looked at the WorldCom KERP?

10 A I do not know whether the RCN board
11 looked at it.

12 Q And do you know if they looked at
13 the Global Crossing KERP?

14 A I do not have the specifics of any
15 of the ones that the board looked at
16 originally. I don't know which ones originally
17 they specifically looked at.

18 Q Are you aware that the Global
19 Crossing KERP cost between 10 and 20 million to
20 cover 300 employees?

21 MR. GOFFMAN: Objection.

22 THE COURT: This is getting a little
23 off the point. Global Crossing is a very
24 different company and very different
25 circumstances.

RCN Corporation

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2 Q Do you know whether any comparison
3 from a dollar standpoint versus an employee
4 number standpoint was done by the board?

5 A I do not know that.

6 Q Do you know whether the board
7 compared severance packages for other companies
8 going through Chapter 11?

9 A Again, I was not a participant in
10 that. I do understand that the board had
11 reviewed multiple different plans that had been
12 put forward in previous situations that had
13 been provided by counsel, Skadden Arps, and
14 also by Merrill Lynch, the former financial
15 advisors, and I believe the Cahill Gordon firm,
16 which represented the company at the time, in
17 addition to Skadden Arps had also provided some
18 information.

19 But I do not know the specific
20 situations and the specifics of what the board
21 reviewed at that time.

22 Q Other than the creditors committee,
23 did you receive input from any of the other
24 constituencies in this case?

25 A I received input from what was I

1 RCN Corporation

2 guess the predecessor to the creditors
3 committee, ad hoc committee note holders, which
4 are the majority of the creditors committee.
5 The people who sit on the creditors committee
6 were also participants in that, with the
7 exception of one, but also got input and
8 discussed this at length with the folks at JP
9 Morgan Chase and their financial advisors, who
10 are the secured lenders to the company at this
11 time.

12 Q And you didn't speak to any of the
13 equity interest, did you?

14 A I did not, no.

15 Q Did anyone from Vulcan Ventures ever
16 tell you that it did not want to participate in
17 the KERP approval process?

18 A I have not spoken to anyone from
19 Vulcan ventures.

20 Q Now, was an independent compensation
21 expert hired to comment on or review the KERP?

22 A I don't know if an independent
23 compensation expert was hired to comment to
24 review it, but the independent compensation
25 committee of the board did review it at length

1 RCN Corporation

2 and approved it and recommended it to the full
3 board.

4 Q But you don't know of the retention
5 of any HR specialist, do you?

6 A I know that they relied on the work
7 that had been done by other outside
8 professionals, Skadden Arps and personnel from
9 the Skadden Arps firm that deals with
10 compensation programs such as this and I know
11 they also relied on the in-house expertise of
12 compensation in our employee services group.

13 Q Now, you're affiliated with APF,
14 aren't you?

15 A AP Services?

16 Q AP services.

17 A I am.

18 Q And AP services, do they stand to
19 earn a success fee in this case?

20 A We do.

21 MS. UNIMAN: I don't have any
22 further questions.

23 THE COURT: Let's me just ask you,
24 the folks that got the payment in May, have any
25 of them left the company?

1 RCN Corporation

2 MR. DUBEL: Your Honor, I think we
3 have had one or two leave. I can think of one
4 in particular that left, but I'm not sure if
5 there was an additional person.

6 THE COURT: What is your belief with
7 regard to the risk that people in this group,
8 this 76 will leave the company if the rest of
9 the payments are not made, if the rest of the
10 KERP is not approved?

11 MR. DUBEL: Because in this
12 situation, your Honor, it has been so well
13 explored with all of the employees and the
14 comfort level that it has provided to them,
15 from what I have seen, is so great that they
16 are being appropriately protected and
17 compensated for the extra work because there is
18 a tremendous amount of extra work that is being
19 put in by these employees to help us through
20 and in certain situations where employees are
21 potentially developing plans that could put
22 themselves out of a job, I believe if they do
23 not, if this is not approved, that it would
24 have a detrimental effect on the overall moral
25 of those 76 and we would probably see a greater

1 RCN Corporation

2 number of those leave than you would normally
3 see within attrition within a company.

4 MR. GOFFMAN: Your Honor, may I ask
5 a question? I can proceed in one of two ways.
6 I do have a series of questions I could ask
7 Mr. Dubel that establishes his track record,
8 his history as an expert in this field to
9 respond to a variety of issues that are raised
10 on direct, but I recognize your Honor has quite
11 a full calendar today and you are accommodating
12 us and I don't want to burden your Honor's
13 record if your Honor doesn't feel it is
14 necessary.

15 THE COURT: I hadn't qualified him
16 as an HR 10 expert, but I do accept his
17 experience generally as someone whose been on
18 the operational side of a large number of
19 bankruptcy cases, so I don't know if that
20 answers your question, unless you want to
21 qualify him as an expert, I don't think I need
22 you to through those types of questions.

23 MR. GOFFMAN: I don't think he needs
24 to be qualified as an expert to offer this
25 business judgment, but maybe I could ask just a

1 RCN Corporation

2 few questions to respond to some of the
3 issues.

4 CROSS-EXAMINATION

5 BY MR. GOFFMAN:

6 Q Mr. Dubel, you are the president and
7 chief operating officer of the debtors?

8 A Yes, I'm.

9 Q And you've been in this practice,
10 how long have you been in this business?

11 A I've been doing this work since
12 approximately 1982.

13 Q And could you describe very briefly
14 for the court your practice, your history?

15 A Yes, I worked with the big five
16 accounting firm Arthur Andersen, which is no
17 longer in existence, in the restructuring group
18 and left in 1993, but I had traditionally spent
19 a vast majority of my time doing debtors
20 advisory work, and then in 1993 I left to go
21 out on my own and work directly inside
22 companies, including situations where I was the
23 chief financial officer and the executive chief
24 restructuring officer of the Leslie Fay
25 companies; chief financial officer of Barney's

1 RCN Corporation

2 New York; chief operating officer of Cellnet
3 Data Systems, telecommunication system; CFO of
4 WorldCom, chief restructuring officer of ET
5 Turner, a telecom equipment manufacturer; CEO
6 of Cable and Wireless America, an IP transport
7 and web hosting company.

8 Q And when were you retained by the
9 debtors?

10 A February 10, 2004.

11 Q What's your position with the
12 debtor?

13 A President and chief operating
14 officer.

15 Q In your capacity, have you been
16 negotiating the terms of a reorganization plan
17 with the creditors constituencies?

18 A Negotiating with the official
19 creditors committee and the prepetition bank
20 lending group.

21 Q Over the course of those
22 negotiations, have you participated in the
23 negotiations of the key employee retention
24 plan?

25 A Since the day I walked on board on

1 RCN Corporation

2 February 10 I have been the person
3 participating in those.

4 Q In those negotiations, have the
5 creditors constituencies reached an
6 accommodation with the debtors what that key
7 employment retention plan would look like?

8 A Yes, I have.

9 Q And were the results of those
10 negotiations presented to the board of
11 directors?

12 A Yes, they were.

13 Q And did you present that to the
14 board of directors?

15 A Yes, I did.

16 Q Are you a participant in the key
17 employee retention plan?

18 A No, I'm not.

19 Q Will you receive any compensation
20 out of the key employee retention plan?

21 A No, I will not.

22 Q Is it your view as the president and
23 chief operating officer of this company that in
24 order to maintain the appropriate employment
25 moral that it is important to have this key

1 RCN Corporation

2 employment retention plan approved today?

3 MS. UNIMAN: Objection.

4 THE COURT: On what basis?

5 MR. UNIMAN: Leading.

6 Q Withdrawn. Mr. Dubel, what's your
7 view on whether or not the key employment
8 retention plan should be approved today?

9 A My view is that it is very important
10 part, I should say an extremely important part
11 of the overall restructuring process as we
12 continue to gain efficiencies, drive costs out
13 and focus on the revenue which is going to
14 create substantial value to the estate. And if
15 this is not approved, then it would have a very
16 detrimental impact on our employees
17 productivity, moral and, ultimately, in my
18 business judgement, I think it would have an
19 impact greater than the amount that we are
20 potentially paying out in terms of detrimental
21 costs to the company of the estate.

22 Q And is it your view that -- was this
23 presentation made to the board of directors?

24 A Yes.

25 Q Do you have an understanding -- what

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is your view as to the basis on which the board made its decision?

MR. UNIMAN: Objection.

MR. GOFFMAN: He can give his view.

THE COURT: I will let that question go. You can answer that question.

A It is my -- the board reviewed all of the information that had been put in front of it prior to my arrival and reviewed the information that I presented to the board, and it is my view that they thought thoroughly and carefully about this because they asked several detailed questions, and that is if we feel it is important to continue to create the value of the estate that we are continuing to create through driving revenue and achieving cost efficiencies.

Q You were asked a series of questions about whether or not you had studied any empirical data studies or charts concerning costs and benefit analysis, and I think you had talked about not having had such charts, but how did you arrive at your determinations?

On what basis did you arrive at your

1 RCN Corporation
2 determinations that this employee retention
3 plan is in the best interest of the debtor's
4 estate?

5 A It is based on my 20 years of
6 experience both being an advisor to debtors and
7 the last 12 or so years being a part of
8 management in companies and being in the bowels
9 of the organization.

10 Q Has the debtor actually lost any
11 senior employees over the last nine months
12 during the restructuring negotiations?

13 A We haven't.

14 Q And is it your view that if we don't
15 have this key employee retention plan that we
16 will lose other key employees at a higher rate
17 it is your view?

18 A It is my view, yes.

19 Q Have you ever turned down Vulcan or
20 Wells Fargo request to have a meeting,
21 conference call, telephone call or any other
22 conversation regarding this restructuring
23 negotiation or key employee retention plan or
24 any other issue?

25 MR. UNIMAN: Objection, your Honor.

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2 THE COURT: On what basis?

3 MR. UNIMAN: Lacks foundation. If
4 he rephrases, perhaps I would withdraw my
5 objection.

6 THE COURT: You can answer the
7 question.

8 A No, I have not.

9 Q To the best of your knowledge, has
10 Wells Fargo ever requested a meeting or
11 conference call with you regarding any issue in
12 this case?

13 A Only in the fact that we solicited
14 some financing from Wells Fargo as part of our
15 replacement financing package, but other than
16 that, no.

17 Q And as far as you know, has Vulcan
18 ever requested a meeting or conversation
19 regarding this restructuring?

20 A No.

21 Q Have they ever requested a meeting
22 or conversation regarding the key employee
23 retention plan?

24 A No.

25 Q Are you aware that Vulcan had

1 RCN Corporation
2 representatives on the board of directors of
3 the debtor as late as the fall, summer or fall
4 of 2003?

5 A I am aware of that.

6 Q Are you aware that they didn't
7 voluntarily resign that position?

8 MS. UNIMAN: Objection, your Honor.
9 Relevancy?

10 THE COURT: You can answer the
11 question.

12 A I am aware that they did resign,
13 yes.

14 MR. GOFFMAN: I have no further
15 questions.

16 THE COURT: Okay. You can step
17 down. You should assume I've read your
18 papers. Does anyone have anything to add to
19 what's previously been said?

20 I have in front of me a motion for
21 approval of a key employee retention plan,
22 which includes two elements, a retention bonus
23 and an enhanced severance package. The plan
24 has been described in the moving papers as well
25 as having been attached to the papers. I've

1 RCN Corporation

2 reviewed it and asked a number of questions
3 about how it works and I believe the record is
4 clear as to how it works.

5 I will grant the debtor's motion for
6 approval of the plan and deny the objection to
7 the motion by Wells Fargo and Vulcan.

8 The standard for considering key
9 employee retention plans has been addressed at
10 length by a number of courts and commentators,
11 as I review that standard, particularly in
12 light of the fact here that the debtor is
13 seeking to assume a prepetition agreement.

14 I looked to first and foremost the
15 guidance from the Second Circuit in re: Ryan
16 Pictures Corp. 4(F)3rd 1085 and 1099 which
17 deals with the Court's review of a debtors
18 decision to assume an executory contract, as
19 well as several of the decisions by in the
20 Southern District and elsewhere regarding
21 specifically key employee retention plans,
22 including in re: Arrow Voxing 269 BR 74,
23 Bankruptcy District of Massachusetts, 2001; in
24 re: Georgetown Steel Company 2004 bankruptcy
25 Lexus 256 and Judge Gerber's opinion in the

1 RCN Corporation

2 Adelphia case, which has been cited in the
3 papers.

4 Those three cases go through the
5 case law at length and have all adopted what
6 may be referred to as a balanced approach which
7 weigh in light of the particular facts and
8 circumstances of the case.

9 First, whether the debtor exercised
10 proper business judgment in entering into and
11 seeking to assume the agreement, as well as
12 whether the program is fair and equitable,
13 consistent with Orion and the Second Circuit
14 case law, including Lionel, cited by Judge
15 Farman in the Montgomery Ward Holding Corp.,
16 case 242 BR 147, D Delaware 1999, the Court
17 should not be fettered by two rigid an approach
18 in evaluating the program like this given that
19 the ultimate decision is whether, in light of
20 all the debtors rights, as well as the rights
21 of the employees involved the decision to enter
22 into the program or to assume the program makes
23 good business sense for the debtor.

24 The proper business judgment aspect
25 of the analysis looks largely at whether, in

1 RCN Corporation

2 fact, the debtors and their board followed well
3 recognized and proper procedures in evaluating
4 the issues because of the obvious benefits of
5 not substituting on a blank slate the Court's
6 business judgment for the judgment exercised by
7 the parties close to the situation.

8 I noted here that the board was
9 actively advised by its professionals
10 throughout the process, not only its outside
11 counsel but also its outside financial advisors
12 in developing a KERP. That, in addition, it
13 was advised starting in February by Mr. Dubel
14 who has extensive experience of approximately
15 20 years in the restructuring area on an
16 operational basis.

17 More importantly, or at least as
18 importantly, the debtors had the active
19 involvement and input of their key creditors
20 constituencies, each of whom was represented
21 not only by counsel but also by financial
22 advisors, that is the secured lender group
23 advised by Simpson Thacher and JP Morgan
24 Chase's financial advisors, as well as the
25 bondholders group before prepetition, as well

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2 as the official creditors committee which
3 consists largely of bondholders, which was
4 advised by its financial advisor Chanon.

5 I think it is not disputed that each
6 of those professionals has extensive experience
7 in evaluating KERP proposals in distressed
8 situations. Therefore, as a result of the
9 deliberations of the board as informed by its
10 professionals and the negotiation of this
11 program as informed by the input of the
12 creditors professionals, I conclude that this
13 KERP as presented to me is the result of arms
14 length and a proper arms length negotiation in
15 a proper process, to the extent that the KERP
16 reflects a settlement and I find that it does
17 in significant part reflect a settlement,
18 particularly as to the CEO's treatment under
19 the KERP, but also with regard to waiver of
20 other rights, including under the chairman's
21 program that is currently in existence and that
22 at least 33 percent of the participants in the
23 KERP belong to.

24 This motion also meets the standards
25 set forth in TNT Trailer Ferry, in particular,

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2 again, it was the result of arms length
3 negotiations by the key parties of interest.

4 I agree with Mr. Dunne that the
5 claims that are to be released in return for
6 this KERP could be not only significant but,
7 also, at least on par with the unsecured claims
8 in the case represented by the creditors
9 committee, and, of course, senior to the equity
10 interests of Wells Fargo and Vulcan so,
11 therefore, as a settlement, this agreement
12 reflects not only an assessment of the merits
13 but also the support of the parties at
14 interest, that is, the unsecured creditors.

15 As far as whether the agreement is
16 fair and equitable, I guess this is the courts
17 way of keeping some independence from the
18 business judgment standard, but I find nothing
19 in this proposal, after my questioning of
20 Mr. Dubel and Mr. Goffman about it in listening
21 to Mr. Dubel's testimony, that shocks me or
22 that strikes me as somehow an unfortunate grab
23 of value.

24 The objectants complain that there
25 is no empirical data; that this program is

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2 necessary to keep those covered by it working
3 for the company.

4 I do not believe, based on the
5 testimony offered, however, that the debtors
6 have to go to the extreme of showing that they
7 have been threatened with resignations if this
8 program is not approved.

9 To the contrary, it strikes me that
10 given the condition of these debtors as
11 consistent with many debtors, the fundamental
12 protections that key employees have when they
13 join a company are in real jeopardy in that it
14 is logical for them to want some assurance that
15 they will be covered on the downside if they
16 are not to be retained as a result of the
17 Chapter 11 case that they are being asked to
18 support and carry through.

19 So, therefore, I believe that there
20 is a sufficient showing, again based in large
21 measure on Mr. Dubel's testimony, that if, in
22 fact, this program were not adopted, there
23 would be sufficient uncertainty and concern
24 among the employees covered by it that the
25 debtor would face a significant risk of

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2 employees quitting and of the additional costs
3 outlined by Mr. Dubel of retaining new
4 employees, as well as the cost of the delay in
5 retaining new employees and the serious risk
6 that the new employees who would be retained
7 would not have the same level of experience or
8 knowledge base as the current employees. So,
9 therefore, I'm satisfied that the KERP
10 represents a proper exercise in the debtors
11 business judgment and that in light of the
12 answers to my questions, as well as the
13 questions of counsel for Wells Fargo and
14 Vulcan, I do not believe that this program,
15 when combined with all of the other rights that
16 the employees have, as well as the rights that
17 they are releasing, constitutes an unfair or in
18 equitable grab for value but rather that it is
19 consistent with the general goal of a Chapter
20 11 case to preserve value, so, therefore, you
21 can submit your order.

22 MR. GOFFMAN: Thank you very much,
23 your Honor.

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C E R T I F I C A T E

I, MICHAEL WILLIAMS, a Certified
Shorthand Reporter and Notary Public of the
State of New York do hereby certify that the
foregoing is a true and accurate transcript of
the within proceedings, to the best of my
ability.

MICHAEL WILLIAMS, CSR